

MEMORANDUM

City Manager's Office



To: Honorable Mayor and City Council

Through: Thomas J. Wilson, City Manager

From: Blair King, Assistant City Manager ^{13K}

Subject: Cable TV Franchise Renewal

Date: February 13, 2004

Background: In January of 2003, Council received a staff report on options for renewal of the cable TV franchise held by Comcast, Inc. The staff recommendation included provisions for the accomplishment of a formal needs assessment followed by informal renewal negotiations. Since adoption of the January 2003 recommendations, a technical review of the Milpitas cable system has been completed, a cable subscriber telephone survey was developed and conducted, a franchise fee desk audit was completed, and a draft needs assessment produced. From these documents, a draft franchise agreement was produced to initiate the negotiation process. The draft franchise document was forwarded to Comcast on October 27, 2003. Staff had requested a response to this document by November 14, 2003. In addition to the draft franchise, a request was forwarded under separate cover requesting a response to several findings in the franchise fee audit. This response was also requested by November 14, 2003. A meeting was scheduled with Comcast for November 24, 2003.

Responses were not provided to either of the letters of October 27, 2003 by the November 14th date, nor were they provided at the November 24th meeting. A subsequent meeting was scheduled for December 9, 2003 and Comcast stated that they would provide a response to both issues. Due to a family emergency, Comcast representatives requested that the December 9th meeting be canceled. They suggested rescheduling the meeting for the week of January 12, 2004. This meeting was subsequently canceled by Comcast due to the unavailability of staff.

City staff had attempted several times to reschedule meetings and received no response from Comcast. On January 15th, a letter was sent to Comcast indicating concern over the lack of progress on both the franchise renewal and the findings of the fee audit. Responses to these issues and a meeting date was requested by January 30th, 2004. As of the date of this staff report, no response has been provided by Comcast. In addition to progress on the franchise renewal, there are two issues of compliance under the existing franchise that require resolution, the response to the franchise fee audit and progress on grounding issues identified to Comcast in September of 2003.

The franchise fee desk audit found a wide variance in the amount of advertising revenue reported in 2000 (\$288,633.69) versus that reported in 2001 (\$432,645.78). Variances of this magnitude suggest possible error and require response. Additionally, based on information and statements provided to the auditors, several non-subscriber revenue sources required to be included in gross revenues calculations by the franchise ordinance were omitted. Additionally, Comcast did not provide timely access to financial records as required under the franchise ordinance. The City's Auditor requested financial records on March 4, 2003. After repeated requests, a notice was sent on

August 4th requesting the records under Section II-22-15.13 of the Franchise ordinance. In response to this formal request, Comcast asked that the City sign a confidentiality agreement prior to release of the records. The City Attorney and the City's Consultant, both concluded that this was not required under the franchise agreement and was not in compliance with the California Public Records Act. The financial records were provided after a six-month delay. These delays extended the length of the audit and caused the City to incur additional expense.

The other open compliance issue involves the grounding of Comcast cable installations within the City. These issues were initially identified in 1996 and were specifically noted in the 1996 franchise assumption now held by Comcast. The technical audit conducted in February and March of 2003 found that these violations still exist. The technical report identified over 180 specific discrepancies and estimated that over 3,500 existed citywide. Staff raised these issues with Comcast and forwarded detailed information on specific violations of California Utility Code and the National Electric Code to Comcast on September 10, 2003. As of this date, no information has been received on efforts to correct these discrepancies.

In addition to these compliance items, there are prior obligations identified in the franchise assumption agreements that staff believes have not been fulfilled. These include access to studio facilities and provision of an institutional network for City use. The assumption agreements included the use of a local origination studio located in the City of Newark. Staff visited this facility and found that it lacked the capability to originate programming for the Milpitas cable system and that it was currently serving a number of other communities and had little available studio time.

The assumption agreements also included a provision to establish an institutional network to link City facilities for video broadcast and teleconferencing. It appears that work was started on this project but was not completed. This capability was not provided by Comcast and the City has subsequently utilized its internal data network to meet this unfulfilled need.

In order to move forward with the compliance items identified in this staff report and preserve the City's rights in any future franchise renewal, staff recommends that Council direct Staff to prepare a resolution for consideration that finds Comcast in violation of the existing franchise agreement. This resolution is required under the City's franchise ordinance to provide formal notice of violation to the franchise holder. Should the resolution be approved, the franchise holder will have a specific time period in which to cure the violations. Failure to comply with the requirements of an existing franchise can be grounds for the denial of franchise renewal.

Recommendations:

1. Note receipt and file staff report.
2. Direct staff to prepare a resolution for Council consideration finding Comcast in violation of the current franchise agreement.

Attachments:

1. Sep 10, 2003 Letter re: Grounding and Installation Issues
2. Aug 4, 2003 Letter re: Request for Franchise Fee Records
3. Sep 18, 2003 Letter re: Confidentiality Agreement
4. Oct 27, 2003 Letter re: Draft Franchise Renewal Document
5. Oct 27, 2003 Letter re: Franchise Fee Audit Findings
6. Jan 15, 2004 Letter re: Response to Draft Franchise and Fee Audit

City of Milpitas

Information Services Department

1265 North Milpitas Blvd., Milpitas California 95035-5479



September 10, 2003

Mr. Eddie Garcia
Director of Government Affairs
Comcast Cable Communications
1900 South 10th Street
San Jose, CA 95112

Dear Mr. Garcia:

As per your request, enclosed is a CD containing a complete draft of the technical review completed for the City Milpitas. You had indicated that Comcast would like to begin to address these issues prior to the franchise renewal. As you will note, the majority of the issues identified in the report deal with grounding of cable attachments. If you have any questions or need additional information, please contact me at 408 586-2701.

Sincerely,

William Marion
Information Services Director

cc: Blair King Assistant City Manager
Brian T. Grogan, Esq., Moss & Barnett

02/04/04

City of Milpitas

Office of the City Manager

455 East Calaveras Blvd., Milpitas California 95035-5479



August 4, 2003

Mr. Eddie Garcia
Director of Government Affairs
AT&T Broadband
1900 South 10th Street
San Jose, CA 95112

Re: Request for Information

Dear Mr. Garcia:

As you know, the City of Milpitas has retained the firm of Moss & Barnett to assist in our franchise renewal. As part of this process, Moss & Barnett is conducting a franchise fee review. An initial request for financial information was sent to your attention on March 4, 2003 with subsequent requests made by phone from both Moss & Barnett and the City. Section III-22-15.13 of the City's Franchise ordinance allows the City to request such information to ensure the correct calculation of franchise fees.

I am requesting your prompt attention to these repeated requests to ensure that Comcast remains in compliance with the existing franchise and to not cause delay in the renewal process. If necessary the City may be forced to consider a franchise violation proceeding against Comcast if Comcast continues to ignore the information requests. Please provide the requested information to Mr. Yuri Berndt of Moss & Barnett as soon as possible or provide a date on which such information will be sent. If you have any questions, please contact me at 408 586-3060.

Sincerely,

Blair King
Assistant City Manager

cc: William Marion, Information Services Director
Brian T. Grogan, Esq., Moss & Barnett
Telecommunication Commission

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02/04/04

BRIAN T. GROGAN
612.347.0340
GroganB@moss-barnett.com

VIA E-MAIL AND U.S. MAIL

September 18, 2003

Ms. Sonia Mehta
Assistant Controller-Regulatory and Compliance
Comcast Western Division
12647 Alcosta Boulevard, Suite 200
San Ramon, CA 94583

Re: Franchise Fee Review -- City of Milpitas, California

Dear Ms. Mehta:

Your correspondence to Mr. Yuri Berndt of Moss & Barnett has been forwarded to my attention for response. Moss & Barnett represents the City of Milpitas ("City") regarding Comcast's request for renewal of its cable television franchise. In that capacity, the City has requested that we conduct a franchise fee review to determine the accuracy of Comcast's franchise fee payments to the City.

The cable ordinance in the City authorizes the City to "examine, audit, review and obtain copies of franchisee's engineering plans and service record relating to the franchise and the operations of franchisee and any all other records required to be kept pursuant to this Chapter." In addition, the ordinance provides that:

To the extent the City shall, in its reasonable judgment, determine it does not have accurate information to assess whether or not the franchise fee has been computed correctly, or to determine whether performance or engineering requirements of a franchise under this Chapter or a Franchise Agreement have been complied with, the City may request such information from franchisee as shall be reasonably necessary to make such determination. All books and records of franchisee with respect to the franchisee's costs of operating and its determination of the franchise fee payable pursuant to this Chapter shall be kept in accordance with generally accepted accounting principles.

The City has been attempting to "obtain copies" of relevant financial information to verify the accuracy of Comcast's franchise fee payments for the past several months. Initially, we communicated with Mr. Eddie Garcia and thereafter with your office. To date we have not received a single document in response to our request for additional information. Rather, you

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have provided us with a comprehensive confidentiality agreement which is not required under the franchise and is not a prerequisite to obtain verification of Comcast's franchise fee payments.

Based on the City's review of the confidentiality agreement the agreement, does not appear to comply with the California Public Records Act ("CPRA") (Gov. Code sects. 6250 et. seq.) with respect to the documentation which a City can shield as confidential. Moreover, the City does not believe it has authority to execute such agreement as any documentation regarding the cable television franchise is likely public and discoverable via a data practices request by any interested party.

The CPRA does, however, contain an exemption from disclosure for information that is protected by law, such as trade secrets. In the event a third party seeks disclosure of documents properly labeled as "trade secret," the City is then required 1) to determine whether the disclosure is required under the CPRA, 2) to notify Comcast prior to disclosing such information or documents, and 3) to provide Comcast an opportunity to seek a court order prohibiting disclosure.

Having said this, it appears this issue may be rendered moot by the type of review the City is requesting. City employees are not seeking access to the requested documents. Rather, they have asked that Moss & Barnett conduct the review and prepare a report regarding its findings. We have conducted numerous franchise fee reviews on behalf of municipalities across the country, including municipalities served by Comcast and/or its predecessor in interest, AT&T. We have never had any problems conducting the review and advising our clients regarding our findings. We are happy to return all documentation provided by Comcast and can agree not to retain any hard copies of such documentation. However, our working notes and internal analysis of such information is our work product is not subject to review by Comcast and will be retained in our files.

In terms of the information we report to the City, it will include any calculations to clarify any alleged underpayments which may be discovered during the course of the review. However, we will endeavor to limit our reference to financial data solely for the purpose of clarifying such issues and will endeavor to limit the disclosure of data which Comcast may deem to be "trade secret." To the extent our initial review of the requested documentation reveals issues which require a more comprehensive analysis, we must reserve the City's right to conduct a more comprehensive review and/or audit of Comcast's books and records for the purpose of verifying the accuracy of franchise fee payments.

I look forward to hearing from you as soon as possible regarding this matter as the City's request for documentation has been considerably delayed. This delay is causing an adverse impact on the timing for processing Comcast's request for franchise renewal. In the event the City and Comcast are unable to agree on a process for verification of franchise fees, the City reserves its

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right to pursue all enforcement actions available to it under local, state and federal law, in particular the enforcement procedures identified in the franchise and applicable local code.

If you should have any specific questions, please feel free to contact me.

Very truly yours,

Brian T. Grogan

BTG/tlh

cc: William Marion, City of Milpitas (via email)
John Bakker, City of Milpitas (via email)
Yuri B. Berndt, Moss & Barnett (via email)

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City of Milpitas

Office of the City Manager

455 East Calaveras Blvd., Milpitas California 95035-5479



October 27, 2003

Mr. Eddie Garcia
Comcast Communications
1900 South 10th Street
San Jose, CA 95112

Re: Informal Cable Television Franchise Renewal Process

Dear Mr. Garcia:

Enclosed herewith please find an "informal" draft Cable Television Franchise Agreement prepared by the City to commence informal negotiations regarding Comcast's request to renew its cable television franchise in the City. This draft franchise has been prepared with input from numerous City departments and based on significant information gathering, which the City has conducted to date.

At this point in the process the City desires to proceed with informal negotiations, and has not finalized a "formal" needs assessment. However, the City is prepared to move to a "formal" renewal process should the parties be unable to reach agreement informally or should Comcast desire to proceed with a formal process.

On behalf of the City we request that you provide a response to the enclosed draft franchise using a "redlined" format. That is underscoring any language you propose to add to the franchise document and striking through language which you propose to delete. Any rationale for the changes which you are proposing would be helpful to assist the City in understanding Comcast's position on various issues. Upon receipt of its redlined franchise from Comcast the City recommends that the parties schedule a face-to-face meeting to discuss any open issues. In particular, the City would like to discuss options for Public, Educational and Government channels.

I am certain Comcast shares the City's desire to complete the renewal proceedings as quickly and efficiently as possible particularly given the approaching holiday season. With this in mind, the City requests that Comcast provide a response to the enclosed draft franchise document on or before November 14, 2003. If this time frame is unworkable for Comcast please contact me at your earliest convenience so that we can arrange our meeting schedules to coordinate with the arrival of Comcast's written response.

The City's contact person in this proceeding will be William Marion, Information Services Director, phone number (408) 586-2701. He will report to me and ultimately staff will report to the City Council regarding final approval of any mutually agreed upon franchise. In your response please

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February 4, 2004

clarify the appropriate contact personnel at Comcast as this will likely help to speed the process. If you should have any questions or if I can provide any additional information, please feel free to contact me.

Sincerely,

Blair King
Assistant City Manager

Attachments:

Draft Cable Television Franchise Ordinance

cc: William Marion, Information Service Director
Brian T. Grogan, Esq., Moss & Barnett
Commissioner Dinesh Gupta, Telecommunications Commission

City of Milpitas

Office of the City Manager

455 East Calaveras Blvd., Milpitas California 95035-5479



October 27, 2003

Mr. Eddie Garcia
Comcast Communications
1900 South 10th Street
San Jose, CA 95112

Re: Franchise Fee Review

Dear Mr. Garcia:

As you know, the City of Milpitas has conducted a franchise fee review to verify the accuracy of franchise fee payments made by Comcast in preceding years. The City has received a written report from Mr. Yuri Berndt of Moss & Barnett regarding his findings in this review. Before the City takes any action to consider the recommendations contained within Mr. Berndt's letter we ask that Comcast carefully review this information and provide any response or clarification which Comcast deems appropriate. Thereafter the City will consider appropriate action to move forward with the recommendations contained within the attached report.

Please provide your response to the report on or before November 14, 2003 so that this matter can be handled at the regularly scheduled December 2, 2003 City Council meeting.

If you should have any questions regarding this matter please feel free to contact my office.

Sincerely,

Blair King
Assistant City Manager

Attachments:

Franchise Fee Desk Audit Report, dated October 15, 2003

cc: William Marion, Information Service Director
Brian T. Grogan, Esq., Moss & Barnett
Yuri B. Berndt, Esq., Moss & Barnett
Commissioner Dinesh Gupta, Telecommunications Commission

02/04/04

City of Milpitas

Office of the City Manager

455 East Calaveras Blvd., Milpitas California 95035-5479



January 15, 2004

Mr. Eddie Garcia
Comcast Communications
1900 South 10th Street
San Jose, CA 95112

Re: Franchise Renewal

Dear Mr. Garcia:

The purpose of this letter is to inquire as to the status of your response to my letters dated October 27th, 2003, regarding our franchise fee desk audit and the City's draft franchise document. As of this date, the City has not received a response from Comcast to either of these two matters. We had requested a response to the fee audit by November 14th, 2003; and from our November 24th meeting with you understood that a response to the draft franchise would be forth coming. I am concerned about the progress of the franchise renewal. The meeting scheduled for December 9th was canceled due to a family emergency. The meeting rescheduled for January 12th was postponed at Mr. Aragon's request. The draft franchise fee was transmitted to you nearly two and a-half months ago and it soon it will be two months since our last, and only, meeting to discuss the franchise agreement.

We respectfully request that you respond to the franchise fee desk audit no later than January 30th, 2004. Additionally, please contact Bill Marion as soon as possible to schedule a franchise renewal meeting. We would like to meet prior to the end of the month. It is our expectation that you will have had time to review and "mark-up" a draft of the franchise agreement prior to the meeting. If you cannot respond within the above time frame, I am afraid that we will be required to inform the City Council of the delays in franchise negotiations and the possible violation of Comcast's obligations under the current franchise agreement.

If you should have any questions regarding these matters, please feel free to contact my office.

Sincerely,

Blair King
Assistant City Manager

c: Brian T. Grogan, Esq., Moss & Barnett
John D. Bakker, City of Milpitas Assistant City Attorney
William Marion, City of Milpitas Information Service Director

02/04/04